

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MORGAN JONES,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 237174

Wayne Circuit Court

LC No. 01-002661-01

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Morgan Jones of second-degree murder,¹ conspiracy to commit armed robbery,² armed robbery,³ felony firearm,⁴ and possession of a firearm by a felon,⁵ for robbing and fatally shooting Ronald Lasure. Jones appeals the trial court's denial of his motion for a *Ginther*⁶ hearing and a new trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Lasure and several friends occupied a house at 8515 Strathmoor in Detroit from which they sold drugs. On the afternoon of the shooting, while Lasure was at his mother's house, Lasure's friend Frederick Abbott overheard another friend, Gerald Webb, talking to Jones, who was not a regular visitor to the house, about the fact that Lasure was carrying two or three thousand dollars. Abbott heard Webb tell Jones that although Webb himself could not rob Lasure, because they knew each other, Jones could do it, because Lasure did not know him. Although Abbott saw that Webb had a .38 special handgun, he did not warn Lasure about this conversation because he "thought they were just joking around." Abbott recalled Webb making

¹ MCL 750.317.

² MCL 750.157a.

³ MCL 750.89.

⁴ MCL 750.227b.

⁵ MCL 750.224f.

⁶ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

about three calls to Lasure's mother's house after this conversation, and eventually Lasure came to the house on Strathmoor.

At around 10:30 that night, Markeith Howard and Nicola Phillip, who lived on Strathmoor and knew Lasure, were driving by Lasure's house. Phillip, the passenger, described seeing two men standing on the sidewalk, one of whom had his arm outstretched toward the other. She saw that one of them had a handgun. As she got closer, she recognized that the two men were Jones and Lasure, and saw that Lasure's Bronco was parked in front of the house. She also saw Abbott and Webb standing nearby. Howard parked the car in front of the neighbor's house, got out, and asked what was going on. Phillip heard Jones tell Lasure three times to drop his money, which Lasure did. Jones then told Lasure to drop his keys, which Lasure did not. Phillip saw them begin tussling, then Lasure broke away and ran to his Bronco, but could not get in. Lasure then ran behind Howard, who was standing behind the open door of his car. Howard told Jones, "Morgan, stop. Just go on. Go on." As Jones started walking away, Lasure went back to his Bronco and got in. Phillip then saw Jones run to the driver's side of the Bronco and heard him shoot twice. Howard and Abbott also testified that Jones fired two shots at "point blank range" and shattered Lasure's driver's side window.

Phillip saw Lasure drive south down Strathmoor onto Mackenzie, the nearest cross-street south of the incident, and Phillip and Howard, whose car was parked facing the opposite direction, drove north down Strathmoor and turned east on Joy Road, the nearest cross-street north of the incident, to see if Lasure was all right. They looked down Mark Twain, which ran parallel to Strathmoor one block east, and saw that a tree had been knocked down, but could not see Lasure, so they drove one block further to Freeland Road, on which they turned south. On Freeland Road, Howard saw a friend who told them that someone had been shot on Mark Twain. Howard got out of the car and walked to Mark Twain while Phillip drove the car to her nearby house before walking back to join him. There the two saw Lasure, shot and lying on the grass, and saw that his Bronco had crashed into the tree. Abbott was also at the scene of the crash, having parked his car on Joy Road and walked down Mark Twain.

By this time, the Detroit Police and paramedics had arrived. As the paramedics were tending to Lasure, Lasure told Officer Abdul Shabazz, "Morgan shot me." Lasure died shortly thereafter. A medical examination of Lasure's body found a single gunshot wound that entered at the neck and passed through the chest. Dr. Carl Schmidt, the forensic pathologist that performed the examination on Lasure's body, testified that this wound was the cause of death. Schmidt stated that there was no evidence of a close-range firing, which is considered to be a shot fired within two feet of the skin. Schmidt did not recover a bullet from the body.

After a five-day trial that included eyewitness testimony of Phillip, Howard, and Abbott, the jury found Jones guilty on all five counts. In a post-conviction motion, defense argued that a *Ginther* hearing was necessary to determine whether trial counsel was ineffective for failing to produce as a witness a woman named Henrietta Shufford,⁷ who lived on Mark Twain. Jones

⁷ Brief references were made at trial to a woman named Henrietta Shepherd; however, because there was no substantive testimony by or about this woman, it is neither clear nor relevant whether Shepherd and Shufford are the same person.

submitted an affidavit purporting to summarize the contents of the actual police statement Shufford made to Sergeant David Moore, although the actual report was never offered to the trial court and neither Shufford nor Moore provided an affidavit of their own.

According to Jones' affidavit, Shufford told Moore that as she was leaving her residence on 8616 Mark Twain Road between 10:30 and 11:00 p.m. on the night of the shooting, she saw a man in a truck facing southbound at the corner of Mark Twain and Joy Road. The driver was talking to two men, one of whom was standing on the passenger side of the truck while the other was on the driver's side. She saw two more men standing on the corner of Mark Twain and Joy Road. She said the man standing by the driver's side started shooting at Lasure, and she heard three or four gunshots. She said that Lasure drove southbound on Mark Twain, then struck a tree. Jones maintains that this testimony indicated that there was a second shooting after Jones shot at Lasure but before Lasure crashed into the tree, giving rise to the possibility that he did not fire the bullet that killed Lasure.

Jones also maintained that counsel failed to investigate the impact scene of the accident in order to determine whether Lasure crashed into the tree while heading north, as the trial testimony indicated, or south, as Shufford's statement allegedly indicated. Jones further argued that counsel failed to follow up on the evidence report, which indicated that a spent bullet had been recovered and was in the evidence room. During discovery, the prosecutor did not produce any documentation on the slug and failed to produce any information about what caliber of slug it was. The trial testimony indicated that Jones shot Lasure with a .38. The defense suggested that the characteristics of the recovered slug were inconsistent with the prosecutor's theory, and might have further substantiated a second shooting.

The prosecution responded that even if everything the defense counsel claimed was true, the prejudice prong of the ineffective assistance of counsel claim still would not be met in light of the clear evidence of Jones' guilt. After hearing oral arguments and reading the defense's brief, the trial court denied both a *Ginther* hearing and new trial.

II. Ineffective Assistance Of Counsel

A. Standard of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.⁸ This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."⁹ We review the trial court's factual findings for clear

⁸ *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

⁹ *Id.* at 579.

error and review de novo its constitutional determination.¹⁰ Because a *Ginther* hearing was not held, our review is limited to mistakes apparent on the record.¹¹

B. Legal Standards

To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.¹² Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.¹³ To show an objectively unreasonable performance, defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."¹⁴ In so doing, defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.¹⁵ Defendant must also show that the proceedings were "fundamentally unfair or unreliable."¹⁶

C. Failure To Call Witness

Jones argues that trial counsel's failure to call Henrietta Shufford as a witness amounted to ineffective assistance of counsel. Jones asserts that Shufford gave a statement to Sergeant David Moore in which she claimed to have seen a shooting take place on Mark Twain as she was leaving her home on that street. However, neither Shufford's statement itself nor an affidavit from Shufford or Moore confirming this representation of her likely testimony appears in the trial court record. Instead, Jones offers an affidavit containing his own representation of the contents of Shufford's statement to Moore. The affidavit does not indicate when, where, or even if Jones himself saw Shufford's statement. This is not sufficient to demonstrate a mistake apparent from the record.¹⁷

Further, counsel's decision not to call witnesses is presumed to be trial strategy,¹⁸ and ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense.¹⁹ A defense is substantial if it might have made

¹⁰ *Id.*

¹¹ *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994), citing *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

¹² *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

¹³ *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

¹⁴ *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

¹⁵ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

¹⁶ *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

¹⁷ See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

¹⁸ *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

¹⁹ *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

a difference in the outcome of the trial.²⁰ In this case, at least three witnesses testified that they saw Jones fire twice at close range into the driver's side window of Lasure's Bronco as he sat in it. In addition, Lasure told an officer that Jones shot him. The autopsy indicated that Lasure suffered only one bullet wound. In light of this evidence, even if Shufford had testified that she witnessed a shooting on Mark Twain, it is unlikely to have made a difference in the outcome of the trial. For these reasons, we conclude that Jones failed to establish that his counsel was ineffective for failing to call Shufford.

D. Failure To Analyze Evidence

The remainder of Jones' argument on appeal focuses on the fact that Lasure could not have told the officer that "Morgan shot me" because Lasure did not know Jones, and could not have identified him by name. Jones argues that counsel was ineffective for failing to pursue this line of reasoning. Apart from being unpreserved, this argument fails on the merits. Trial testimony indicated that Lasure was standing behind Howard when Howard addressed Jones by his first name shortly before the shooting occurred. Thus, even if Lasure did not know who Jones was before the incident, he had the opportunity to learn his name before he identified Jones as the shooter.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Jessica R. Cooper

²⁰ *Id.*